No. 82-1071

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALUMINUM COMPANY OF AMERICA, ET AL., PETITIONERS
v.
CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED*

Whether the court of appeals, in determining that the Bonneville Power Administration "unreasonably" interpreted its statutory mandate to supply federal power to nonpreference industrial customers, contravened established principles of judicial review and imposed a judicially created plan of power allocation in place of the carefully crafted statutory plan intended by Congress.

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*The federal respondents include: Peter Johnson, Administrator of the Bonneville Power Administration, Donald Paul Hodel, Secretary of the Department of Energy, and the United States of America.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A-1 to A-14) is reported at 686 F.2d 708. The decision of the Administrator of the Bonneville Power Administration is reported at 46 Fed. Reg. 44340 (1981).

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1982. The court of appeals' opinion was amended on September 7, 1982, and a petition for rehearing was denied on September 27, 1982. The petition for a writ of certiorari was filed on December 23, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. (Supp. V) 839 *et seq.* are set out at Pet. 1-4 and Pet. App. B-1 to B-75.

STATEMENT

1. Since the enactment of the Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.*, the federal government has provided low-cost hydroelectric power to public utilities, federal agencies, investor-owned utilities and direct service industrial customers (DSIs) in the Pacific Northwest. Although the 1937 Act granted a preference in the sale of such power to public utilities (16 U.S.C. 832c), for many years the Bonneville Power Administration (BPA) generated sufficient power to meet the purchasing requests of all customers. Until 1948, BPA's contracts with nonpreference customers (i.e., investor-owned utilities and DSIs) provided for supply of the full contractual amount of power on a "firm," non-interruptible, basis.[1] That situation changed, with respect to the DSIs, in 1948 when BPA modified its industrial sales policy to require, where feasible, that industries served directly by BPA take some nonfirm power together with firm power. G. Norwood, *Columbia River Power for the People, A History of the Policies of the Bonneville Power Administration* 161 (1981). This modification recognized the fact that nonfirm service could be of significant operational benefit by enabling BPA to interrupt the nonfirm portion of the DSI load to provide reserves for other customers. In this way, BPA could defer

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[1] "Firm" power is energy BPA can reliably expect to produce and must be plentiful enough to cover firm contractual obligations, such as utilities' loads. "Nonfirm" power is energy in excess of amounts that can reliably be expected; it is provided only when such excess exists, it is not guaranteed, and it is subject to interruption to protect service to firm obligations. See 16 U.S.C. (Supp. V) 839a(17).

the need to acquire additional generation. *Ibid.* See page 5 & note 2, *supra.*

The situation changed even more significantly in the 1970's. The growth of population and industry in the region had reached the point where projections showed that preference customers would soon require all of BPA's power, thus threatening to cut off all other customers. See H.R. Rep. No. 96-976 (Pt. I), 96th Cong. 2d Sess. (1980); Pet. App. D-61 to D-63. In light of these changed circumstances, BPA announced that firm power sales to investor-owned utilities would cease in 1973 (Pet. App. D-61). In 1975, BPA's contracts with DSIs specified that 25% of the power available to the DSIs (the so-called "first quartile") would be nonfirm, or subject to interruption. And in 1976 BPA issued Notices of Insufficiency to preference customers and informed DSI customers that their contracts would likely not be renewed (*id.* at D-62).

To avoid the results of this shortfall, and to prevent what was described as a "regional civil war" over access to federal power resources, Congress set about developing an equitable system of allocation. H.R. Rep. No. 92-976 (Pt. I), *supra*; Pet. App. D-1 to D-143. This effort culminated in the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. (Supp. V) 839 *et seq.*, which sought to achieve its goals in several ways. While the public utilities would continue to have a preference (16 U.S.C. (Supp. V) 839c(a)), other provisions of the Act created boundaries for the application of that preference as defined by the allocation plan Congress created. That plan included the following components.

a. Investor-owned utilities were entitled to have BPA meet their full net firm requirements and to participate in the federal power program under an "exchange" arrangement (16 U.S.C. (Supp. V) 839c(b)(1) and (c)(1)). Such utilities could "swap" their own power, at average system

cost, for an equal amount of lower-priced federal power from BPA. In this way, residential customers of the private utilities would derive the benefits of cheaper power. H.R. Rep. No. 96-976 (Pt. I), *supra*, at 60; Pet. App. D-120 to D-121.

b. BPA was to recoup its cost of participating in the private utility power exchange by charging higher prices to DSIs. In return, the DSIs were afforded certain benefits: BPA was required to offer long-term contracts to its existing DSI customers for the full amount of power to which they were entitled under prior contracts entered into in 1975 (16 U.S.C. (Supp. V) 839c(d)(1)(B)). A significant difference between the new and old DSI contracts was greater reliability as to the power to be offered. Under the 1975 contracts, 25% of the power made available to the DSI's was "nonfirm" or "interruptible," that is, BPA could restrict deliveries of this first "quartile" of power at any time. Thus, this first "quartile" was subject to interruption whenever a preference customer requested the power; in that event, it was sold to the preference customer rather than to the DSIs. In effect, this quartile of power was available on request to public utilities without any limitation on the preference customers' reasons for interrupting BPA's sales to DSIs.

Under the 1980 Act, however, this situation was changed. Rather than allowing unrestricted curtailment of the power available to the DSIs' first quartile, the Act provides that sales to DSIs "shall provide a portion of the Administrator's reserves for *firm power loads* within the region." 16 U.S.C. (Supp. V) 839c(d)(1)(A) (emphasis added). This definition of the reserve status of power available to DSIs enhanced the quality of the power by restricting the circumstances in which the flow of power could be interrupted. It therefore precluded the previous practice of interrupting service to make nonfirm sales to public utilities.

c. Rounding out the statutory allocation plan, the Act provided a preference for public utilities to satisfy their firm load needs. To solve the problem of assuring that BPA had sufficient power to satisfy its statutorily mandated contractual obligations to all classes of customers, the Act, for the first time, permitted BPA to acquire "sufficient resources * * * to meet [its] contractual obligations * * *," 16 U.S.C. (Supp. V) 839d(a)(2)(A).[2] In addition, to insure against the possibility that initial contracts under the Act would be challenged on the ground that preference rights were violated because BPA lacked adequate power to serve all of its customers, 16 U.S.C. (Supp. V) 839c(g)(7) provides that "[BPA] shall be deemed to have sufficient resources for the purpose of entering into the initial contracts * * *." See H.R. Rep. No. 96-976 (Pt. I), *supra*, at 37, 64; Pet. App. D-82.

2. Following the enactment of the statute in 1980, BPA's Administrator offered long-term contracts to the DSIs as the Act required. Those contracts (Pet. App. H-1; emphasis added) permit BPA to

> * * * restrict deliveries of Industrial Firm Power in amounts up to 25 percent of the Purchaser's Operating Demand, at any time and for any reason in order to protect *Bonneville's ability to meet its Firm Obligations* * * *. Such restriction shall not be made for the purpose of selling nonfirm energy* * *. Bonneville will treat the Purchaser's First Quartile as a firm load for purposes of resource operation, which firm load shall be subject to the restriction rights provided by this subsection.

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[2]Prior to the 1980 Act, BPA had no general authority to augment its federally generated power by acquiring additional resources elsewhere. See Pet. App. D-62 to D-63.

In offering these terms, the Administrator explained (46 Fed. Reg. 44348 (1981)) that BPA would be providing the "amount of power equivalent" to that contained in the DSIs' 1975 contracts for industrial firm power, as set forth in 16 U.S.C. (Supp. V) 839c(d)(1)(B), under changed conditions of interruption. The first quartile is to serve as a reserve for BPA's firm obligations; accordingly, the contract paraphrases the language of 16 U.S.C. (Supp. V) 839c(d)(1)(A). The Administrator noted that this proposal conformed with Congressional intent to serve 75% of the DSI load from BPA's own firm resources and to serve the first quartile "as if it were firm."[3] The first quartile would be served as if it were firm when BPA's resource availability permitted; but BPA would interrupt it when needed to meet BPA's firm obligations to its other customers. Thus, the first quartile would serve as an operating reserve, as the House Report specified.[4]

3. Pursuant to the Act's provisions for judicial review (16 U.S.C. (Supp. V) 839f(e)), certain preference customers petitioned for review in the United States Court of Appeals for the Ninth Circuit.[5] They contended that the Administrator's decision violated their rights to preference under Sections 5(a) and 10(c) of the Act, 16 U.S.C. (Supp. V) 839c(a)

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[3]See S. Rep. No. 96-272, 96th Cong., 1st Sess. 59 (1979); Pet. App. F-74. The Administrator found a similar intent expressed in the House Report. H.R. Rep. No. 96-976 (Pt. II), 96th Cong., 2d Sess. 48 (1980); Pet. App. E-106 to E-107.

[4]H.R. Rep. No. 96-976 (Pt. I), *supra*; Pet. App. E-106 ("Approximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation and will provide an operating reserve that may be restricted by BPA at any time in order to protect the Administrator's firm loads within the region * * *").

[5]Pursuant to Section 9(c)(1)(B) of the Act, 16 U.S.C. (Supp V) 839f(e)(1)(B), sales of power under Section 5, 16 U.S.C. (Supp V) 839c, constitute final agency action subject to judicial review.

and 839g(c); that BPA had offered the DSIs more power than the amount to which they were entitled under the 1975 contracts, in violation of Section 5(d)(1)(B) of the Act, 16 U.S.C. (Supp. V) 839c(d)(1)(B); and that BPA's administrative procedures were contrary to law.[6]

The Ninth Circuit rejected BPA's interpretation of the Act and voided the contract provisions that ensured that the first quartile would be available as a reserve to meet BPA's firm power loads. The court concluded that, because the sales of nonfirm power under the 1975 contracts were contingent upon availability and upon public utilities' requests for nonfirm power, the first quartile had not been "allocated" to the DSIs. Hence, the DSIs were not "entitled" to this amount under the 1975 contracts and it could not be offered to them now. Pet. App. A-6 to A-8.

In addition, the court held that, even if BPA correctly discerned Congress' intent to allocate the nonfirm power to the DSIs, BPA's interpretation was unreasonable. Pet. App. A-8.

DISCUSSION

The court of appeals has undone precisely what Congress intended to do when it passed the Act, namely, the creation of a statutory plan of allocation to remedy pressing energy problems facing the Pacific Northwest. Under the decision below, the allocation of low-priced federal hydroelectric power would effectively revert to the situation that existed with respect to the DSIs before the 1980 Act was passed; preference customers could at any time and for any reason interrupt the flow of power to the DSIs' first quartile. Thus, the orderly apportionment Congress intended would be

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[6]The court of appeals did not reach the procedural issue (Pet. App. A-14 n.10) and it is not before this Court on the petition for a writ certiorari.

thrown into disarray. The DSIs would have no assurance of receiving power for their first quartile without a serious risk of interruption; and a significant portion of the power sold to DSIs could be diverted to preference customers at lower prices, in which event BPA would be deprived of revenues intended to subsidize the exchange program for residential customers of investor-owned utilities.

Even so, we recognize that this case may not satisfy the traditional criteria for certiorari. The decision below will affect only the Pacific Northwest; in addition, there is no conflict among the circuit courts.[7] We note, on the other hand, that, because original jurisdiction is vested exclusively in the court of appeals for the region (16 U.S.C. (Supp. V) 839 f(e)(5)), there is no prospect of a direct conflict of decisions. Accordingly, it is unlikely that the court below will be persuaded to correct its misreading of the statute,[8] especially given the absence of any clear guidance from this Court, which has had no occasion to consider preference clauses in a like context. Moreover, the practical fact is that the decision below could have a severe impact on the national economy: approximately one-third of the nation's total aluminum supply is produced by BPA's DSI customers, many of whom may terminate operations if the court of appeals' decision is not reversed.[9] In addition,

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[7]The decision below is, however, inconsistent with *Volunteer Electric Cooperative* v. *TVA*, 139 F. Supp. 22 (E.D. Tenn. 1954), aff'd, 231 F.2d 446 (6th Cir. 1956) (construing preference clause in TVA Act).

[8]Because Section 9(e)(5) of the Act, 16 U.S.C. 839f(e)(5), establishes a 90-day period from the date of agency action within which judicial review may be sought, there is no prospect that any court will have an opportunity to review the question presented by the contracts at issue here. Accordingly, unless the decision below is reversed, the Ninth Circuit's erroneous reading of the statute will be controlling for the 20-year life of the DSI contracts.

[9]One former DSI customer has already closed its plant in the region; three others have threatened to do the same.

BPA provides more than 50% of the power in the Pacific Northwest (H.R. Rep. No. 96-976 (Pt. II), *supra*, ¶26; Pet. App. E-68; S. Rep. No. 96-272, *supra*, at 17; Pet. App. F-37). In our view, these considerations justify granting the petition.

1. This area of federal regulation is obviously quite complex and Congress has delegated to BPA responsibility for implementing the Act and broad discretion with respect to the terms of sale and interruptibility of power to each class of customer. We submit the court of appeals failed to accord appropriate deference to BPA's expertise. Although it noted that BPA's position finds "[s]upport" in the legislative history (Pet. App. A-10 & n.7)—a conclusion that would ordinarily compel affirmance of the agency's decision—the court nevertheless supplanted the agency's interpretation with a judicially created plan of allocation.

The agency decision at issue here was made immediately following the Act's passage "by the men charged with the responsibility of setting its machinery into motion, of making the parts work efficiently and smoothly while they are yet untried and new," *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 667-668 (1980), quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933), and is thus entitled to considerable weight. As this Court recently observed, "[w]e have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference," *Blum* v. *Bacon*, No. 81-770 (June 14, 1982), slip op. 10. See also, e.g., *E.I. dupont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971). This principle is particularly compelling where, as here, the agency made major contributions to

Congress' consideration of the statute (see Pet. 14) and the terms of interruptibility contained in the contract provision at issue were brought to Congress' attention and expressly approved. See Pet. 14-15 & n.7; *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 (1940); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248, 251 (1978); *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

Accordingly, the Ninth Circuit's rejection of BPA's interpretation cannot be reconciled with this Court's instruction that " '[t]o sustain * * * [the agency's] application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' " *Udall* v. *Tallman*, *supra*, 380 U.S. at 16, quoting *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 153 (1946). Here, the court has intruded upon the very complex area of the *terms* of hydroelectric power marketing. The opinion below—which relies almost exclusively upon incorrect technical characterizations at odds with those of the expert agency—does not faithfully execute this Court's holdings concerning review of agency statutory interpretation.

2. The court of appeals placed undue reliance on Section 5(a), 16 U.S.C. (Supp. V) 839c(a), which preserved the preferences recited in the 1937 Act. While Congress retained the existing public utility preference, Section 5(a) must be understood in the context of the 1980 legislation. That section is not the entirety of the Act and, if read in isolation, will produce a result quite at odds with the legislative purpose. For, if Congress had intended to perpetuate the preference without modification, no further legislation was

necessary; indeed, the entire 1980 statute would be redundant if it was intended to do nothing more than preserve the status quo under the 1937 Act. See H.R. Rep. No. 96-976 (Pt. I), *supra*, at 36-37; Pet. App. D-80 to D-81.

BPA recognizes the continued vitality of the preference provision and the agency's interpretation will preserve it just as Congress intended. Under the 1980 Act, BPA is required to offer contracts to certain nonpreference customers, including DSIs. Once these commitments have been satisfied, any further energy generated by BPA ("surplus" energy) is available for sale in accordance with the preference. Section 5(f), 16 U.S.C. (Supp. V) 839c(f). Thus, the surplus will be offered first to public utilities in accordance with the preference. But the court of appeals' opinion would strip the nonpreference customers of their statutory entitlement to purchase firm power by elevating the preference clause to a primacy Congress never intended. It was the threat that such an exercise of preference by public utilities would curtail sharply or eliminate BPA sales to other customers that led Congress to act.

Congress, moreover, was fully cognizant that the 1980 Act would modify the quantity of power whose allocation would be governed by preference rights in the region served by BPA. In response to stated concerns that the 1980 Act's allocation might be construed in a manner that would alter preference rights under other federal energy legislation affecting other regions of the country (Pet. App. D-76), the House Report stated its intention that the Act not "alter, diminish, abridge, or otherwise affect, either directly or indirectly, the preference provisions of *other* Federal [Power] laws." Pet. App. D-78, quoting Section 10(c), 16 U.S.C. (Supp. V) 839g(c) (emphasis added). See also Pet. App. D-143.

3. The court of appeals failed to recognize that the new DSI contracts are fully consistent with the statutory directive that existing DSIs be offered "an amount of power equivalent to that which such customer is entitled under its contract dated * * * 1975." Section 5(d)(1)(B), 16 U.S.C. (Supp. V) 839c(d)(1)(B). BPA's interpretation is in full accord with this legislative mandate. Accordingly, the new contracts provide the DSIs with the same amount of power to which they were previously entitled. That the new contracts improve the quality of first quartile power, by limiting the circumstances of interruption, does not alter the fact that the DSIs were entitled to the same total *amount* under the 1975 contracts. Nor is the improvement in quality inconsistent with the Act; it is in perfect consonance with the language of Section 5(b)(1), 16 U.S.C. (Supp. V) 839c(b)(1), and the statutory allocation that Congress created.[10]

4. The court of appeals decision will have a significant adverse impact on the government as well as on BPA's nonpreference customers. By way of illustration, under the Act's residential exchange program BPA is obligated to swap an equivalent amount of low-cost federal power with investor-owned utilities for the benefit of residential users. In the first year (fiscal 1982) following passage of the Act, the net cash benefit of this exchange to the private utilities was $216,592,967. The same figure, of course, represents the amount of loss BPA incurred in the exchange. When these costs are projected over the life of the DSIs' 20 year contracts, BPA estimates an aggregate cost of $10 billion. The Act specifies that this shortfall is to be funded principally by

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[10]Section 5(b)(1), 16 U.S.C. (Supp. V) 839c(b)(1) defines the public utilities' preference in terms of "electric power to meet the *firm power load* of such public body" (emphasis added).

sales to DSIs.[11] Yet, if the flow of first quartile power to DSIs is subject to unlimited interruption by preference customers, as the decision below envisions, the anticipated revenues will not be recovered from the DSIs.

This loss would lead to several foreseeable results: BPA will incur a significant revenue shortfall which would require BPA to defer payments it is scheduled to make to the United States Treasury (see Dep't of Energy Order RA 6120.2, "Power Marketing Administration Financial Reporting," (Sept. 9, 1979); Section 7(a)(2)(A); 16 U.S.C. (Supp. V) 839e(a)(2)(A)) to recoup the shortfall, BPA will have to seek increases in rates paid by other customers, thereby depriving residential users in the region of the full benefits of low-cost federal power; or, BPA will have to acquire, by the purchase of generation from new generating units or by other commercial purchase, additional power to meet its contractual obligations, with these costs being borne either by the government or BPA's customers.[12] All of these eventualities share a common element: each would thwart Congress' stated intent to make low-cost federal power available in the region in accordance with the statutory plan of allocation.

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[11]Section 7(c)(1)(A) of the Act, 16 U.S.C. (Supp. V) 839e(c)(1)(A), specifies that the costs BPA incurs from the exchange with private utilities are to be recovered from DSIs "to the extent that such costs are not recovered through rates applicable to other customers." Under the Act, DSI rates will be computed differently before and after 1985, but both calculations assume a high average availability of first quartile power as essential to fulfill the Act's goals. See S. Rep. No. 96-272, *supra* at 59; Pet. App. F-74.

[12]The amount of power at issue in this case is approximately 1,000 megawatts. The Department of Energy estimates that the cost of constructing a nuclear power plant with this capacity would be between two and three billion dollars. See Federal Respondents' Reply to Preference Customers' Response to Petition for Rehearing at 2-3.

We note, in addition, that many of the DSIs are in the economically troubled aluminum industry. Reduced availability of power to the DSIs' first quartile will necessarily have an adverse effect by increasing the likelihood of plant closures.[13] These plant closures will in turn give rise to the possibility that additional DSIs will similarly shut their operations if the remaining DSIs are required to assume the full cost of exchange. In the event that the DSIs are unable to—or for any reason do not—pay the exchange costs, the impact will be felt by the federal treasury when BPA defers its repayment obligations. As a result, BPA operations would cause an enormous drain on federal funds, a consequence Congress clearly did not intend when it created the balanced plan of allocation and payment contained in the Act.

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[13]See note 9, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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